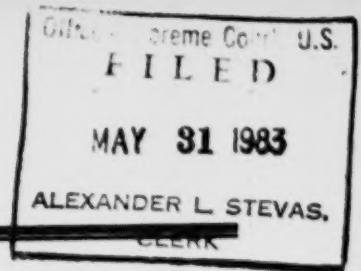


82 - 1988



No. -----

# In the Supreme Court of the United States

OCTOBER TERM, 1982

**BRUCE TOWER**, Public Defender  
of Douglas County, Oregon, and

**GARY BABCOCK**, Public Defender  
of the State of Oregon,

Petitioners,

v.

**BILLY IRL GLOVER**,

Respondent.

Petition for Writ of Certiorari  
to the United States Court of Appeals  
for the Ninth Circuit

**DAVE FROHNMAYER**  
Attorney General of Oregon  
**WILLIAM F. GARY**  
Solicitor General  
**\*JAMES E. MOUNTAIN, JR.**  
Deputy Solicitor General  
100 Justice Building  
Salem, Oregon 97310  
Telephone: (503) 378-4402  
Counsel for Petitioners

\*Counsel of Record

## **QUESTION PRESENTED**

Whether 42 U.S.C. § 1983 authorizes a convicted person to assert a claim for damages against the public defenders who represented him at his criminal trial and appeal, on a theory that the public defenders deprived him of his constitutional rights pursuant to a conspiracy with state judges and administrative officials.

## TABLE OF CONTENTS

Brief	Page
Question Presented.....	i
Opinions Below .....	1
Jurisdiction .....	1
Constitutional Provisions and Statute Involved .....	2
Statement of the Case.....	3
Reasons for Allowance of Writ.....	8
Conclusion.....	18
Appendix A .....	19
Appendix B.....	25
Appendix C.....	29

## TABLE OF AUTHORITIES

Cases Cited	Page
Agersinger v. Hamlin, 407 US 25 (1972) .....	15
Black v. Bayer, 672 F2d 309 (1982) .....	8,14,17
Briscoe v. Lahue, — US —, 103 SCt 1108 (1983) .....	12
Brown v. Joseph, 463 F2d 1046 (3rd Cir. 1972) .....	14
Dennis v. Sparks, 449 US 24, 29 (1980) .....	8
Dodson v. Polk County, 628 F2d 1104 (8th Cir. 1980), <i>reversed on other grounds</i> , Polk County v. Dodson, 454 US 312 (1981) .....	9
Ferri v. Ackerman, 444 US 193 (1979) .....	Passim
Gideon v. Wainwright, 372 US 335 (1963) .....	15
Billy Irl Glover v. Bruce Tower, Public Defender of Douglas County, Oregon and Gary Babcock, Public Defender of the State of Oregon, No. 81-3199 (March 1, 1983) .....	1
Glover v. Tower, 700 F2d 556 (9th Cir. 1983) .....	1,8,10
Hall v. Quillen, 631 F2d 1154, 1155 (4th Cir. 1980) .....	9
Housand v. Heimen, 594 F2d 923 (2d Cir. 1979) .....	9
Imbler v. Pachtman, 424 US 409 (1976) .....	12,16
Miller v. Barilla, 549 F2d 648, 649 (9th Cir. 1977) .....	6,7
Minns v. Paul, 542 F2d 899 (4th Cir. 1976) .....	9
Pierson v. Ray, 386 US 547 (1967) .....	12
Polk County v. Dodson, 454 US 312 (1981) .....	Passim
Robinson v. Bergstrom, 579 F2d 401 (7th Cir. 1978) .....	10

### Constitutional Provisions

US Const, Amend VI .....	2
US Const, Amend XIV .....	2

## TABLE OF AUTHORITIES — Continued

Statutory Provisions	Page
FRCP Rule 12 .....	2
28 USC § 1254 .....	2
28 USC § 2101 .....	2
42 USC § 1983 .....	Passim

### Other Authorities

Benner, L. & Neary, B, <i>The Other Face of Justice</i> 72 (1973)....	15
Mounts, <i>Public Defender Programs, Professional Responsibility, and Competent Representation</i> , 1982 Wis. L. Rev. 473, 481 n. 40 .....	15

Petitioner Bruce Tower, the Public Defender of Douglas County, Oregon, and petitioner Gary Babcock, the Public Defender of the State of Oregon, respectfully pray that this Court issue a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in *Billy Irl Glover v. Bruce Tower, Public Defender of Douglas County, Oregon and Gary Babcock, Public Defender of the State of Oregon*, No. 81-3199 (March 1, 1983).

### OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals in this matter is reported as *Glover v. Tower*, 700 F2d 556 (9th Cir. 1983). In its opinion and ensuing judgment, the Court of Appeals affirmed in part, reversed in part, and remanded the judgment of the United States District Court for the District of Oregon which had dismissed respondent Glover's civil rights action for failure to state a claim. The opinion of the Ninth Circuit Court of Appeals is attached to this opinion as Appendix A. The unreported order of the United States District Court for the District of Oregon is attached as Appendix B.

### JURISDICTION

The opinion of the Ninth Circuit Court of Appeals was dated and filed on March 1, 1983. The judgment sought to be reviewed was entered on the same date. Jurisdiction to review the Court of

Appeals judgment in this civil case by writ of certiorari is conferred upon this Court by 28 U.S.C. § 1254(1). This petition for a writ of certiorari is filed within the 90-day period prescribed by 28 U.S.C. § 2101(c), as computed in accordance with Rule 20 and Rule 29(1) of the Rules of the Supreme Court of the United States.

### **CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED**

The resolution of the issue presented in this petition involves the Sixth and Fourteenth Amendments of the United States Constitution and the federal statute authorizing civil actions for deprivation of rights, 42 U.S.C. § 1983.

United States Constitution, Amendment VI provides in pertinent part:

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence [sic]."

United States Constitution, Amendment XIV provides in pertinent part:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State where they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. § 1983 provides in pertinent part:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.  
\* \* \*"

## STATEMENT OF THE CASE

### 1. Summary of Facts

While he was incarcerated in the Oregon State Penitentiary, respondent Glover filed an action under 42 U.S.C. § 1983 against Douglas County Public Defender Bruce Tower and Oregon State Public Defender Gary Babcock. (Cr. 3, pp. 1, 2). Glover's *pro se* complaint was made on a form provided by the United States District Court for the District of Oregon. (Cr. 3, p. 1). Glover complains of an alleged "conspiracy by state officials acting under a color of state authority to deprive [him] of his civil rights . . .". (Cr. 3, p. 1). The gist of Glover's complaint is that his public defenders at trial and on appeal violated his constitutional rights by conspiring with trial judges, the judges of the Oregon Court of Appeals, and named and unnamed state administrative officials to secure and to sustain his conviction on a felony charge brought by the State of Oregon. (Cr. 10, p. 1).

Glover alleges that his trial attorney, petitioner Tower, a county public defender, conspired with state trial court judges to deprive Glover of his liberty by refusing to discharge the responsibilities and obligations of a court-appointed defense counsel. (Cr. 3, p. 3). Glover maintains that Tower conspired with state officials to prevent Glover from presenting a defense of mental disease or defect in his criminal prosecution. (Cr. 3, p. 4). Glover also claims that Tower participated in a conspiracy to deprive Glover of his right to defend himself by refusing to withdraw from the case. (Cr. 3, pp. 4-5).

With regard to the state court appeal of his criminal conviction, Glover alleges that petitioner Babcock, the state public defender, deliberately deprived Glover of a fair and adequate appeal. (Cr. 3, p. 5). Glover maintains that Babcock refused to obtain printed portions of the trial record, prepared an inadequate opening brief, and refused to correct the brief upon Glover's request. (Cr. 3, p. 5). Glover alleges that public defender Babcock, as did public defender Tower, knowingly and deliberately deprived him of his basic civil rights to defend himself against serious criminal charges pursuant to a conspiracy. (Cr. 3, pp. 5-6).

Glover also alleges that members of the judicial and executive branch of Oregon government were involved in the conspiracy against him. He claims

that "state agents" not only persuaded petitioner Tower to do nothing to prepare for Glover's defense, but that they also persuaded trial court judges to ignore his requests for redress. (Cr. 3, p. 4). Glover alleges that the Oregon Court of Appeals intentionally participated in the conspiracy by accepting the appellate brief prepared by petitioner Babcock over Glover's objections and by refusing to allow Glover to represent himself during his appeal. (Cr. 3, Exhibit at 4, 5).

Glover maintains that the purpose of the conspiracy was to prevent his disclosure of dishonest actions by state officials. (Cr. 3, p. 5). He further alleges that the mastermind of the conspiracy was a former Oregon Attorney General who, in his capacity as a court of appeals judge, placed himself on the panel that reviewed Glover's criminal appeal. (Cr. 3, p. 6). In his complaint, Glover prays for no compensatory damages; he seeks \$5 million in punitive damages from public defender Tower and the same amount from public defender Babcock.

A copy of Glover's complaint is attached as Appendix C to this petition.

## **2. Procedural History: Basis of Federal Jurisdiction**

Respondent Glover's civil complaint under 42 U.S.C. § 1983 and other provisions of the Civil Rights Act was filed on December 12, 1980. (Cr. 3,

p. 1). Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, petitioner public defenders Tower and Babcock moved for dismissal of Glover's complaint on the ground that it failed to state a claim upon which relief could be granted. (Cr. 6, p. 1). In a memorandum supporting their dismissal motion, Tower and Babcock maintained that Glover's purported § 1983 action against them should be dismissed because, as public defenders, they were absolutely immune from liability under § 1983 for acts performed in representing a defendant in a criminal trial. (Cr. 6, pp. 2-4). Tower and Babcock expressly relied upon the opinion of the Ninth Circuit Court of Appeals in *Miller v. Barilla*, 549 F2d 648, 649 (9th Cir. 1977) in which the court held "that a public defender should be accorded absolute immunity from § 1983 damage claims for acts done in performance of his judicial functions as a public defender." (Cr. 6, pp. 2-3).

On April 3, 1981, the United States District Court for the District of Oregon entered an order granting petitioners' motion to dismiss. (Cr. 10, p. 3; App. B, p. 3). Citing *Miller v. Barilla, supra*, the District Court ruled in its unreported order that "... plaintiff has not stated a claim under 42 U.S.C. § 1983 because public defenders are absolutely immune from liability for acts done in the performance of their judicial function." (Cr. 10, p. 2; App.

B, p.2). Thereupon, the District Court entered a judgment dismissing Glover's action. (Cr. 11).

On April 7, 1981, Glover filed a notice of appeal *pro se*. Glover filed a *pro se* opening brief. After petitioners Tower and Babcock filed an answering brief, the Court of Appeals appointed the Northwestern Legal Clinic of the Lewis and Clark College Northwestern School of Law to represent Glover on the appeal. The Court of Appeals set a revised briefing schedule, and counsel for the parties submitted supplemental briefs which addressed, among other issues, the question of the immunity of public defenders from liability for damages under § 1983.

The Ninth Circuit Court of Appeals heard oral arguments on this issue on December 7, 1982. In an opinion issued on March 1, 1983, a panel of the Court of Appeals reversed the portion of the District Court's order which had ruled that public defenders Tower and Babcock were immune from liability under § 1983. The panel reasoned that its precedent in *Miller v. Barilla, supra*, was no longer good law in light of this Court's subsequent decision in *Ferri v. Ackerman*, 444 US 193 (1979). The Ninth Circuit panel concluded "that *Miller* cannot survive the rationale of *Ferri*, and that "*Ferri* and *Polk County v. Dodson*, [454 US 312 (1981)], are inconsistent in principle with any immunity qualified or absolute, of public defenders charged with conspiring with

state officials in violation of 42 U.S.C. § 1983.  
 \* \* \*” *Glover v. Tower, supra*, 700 F2d at 558, 559.  
 (App. A, p. 5).

### REASONS FOR ALLOWANCE OF WRIT

This case presents an important issue of federal law which should be settled by this Court. The question whether public defenders are immune from liability under 42 U.S.C. § 1983 for their actions in representing indigent defendants in the course of criminal prosecutions was left open by this Court in *Polk County v. Dodson, supra*, 454 US at 317, n. 4. The public defender immunity issue is squarely presented here.<sup>1</sup> The Ninth Circuit Court of Appeals incorrectly resolved this issue because it misconstrued and misapplied this Court’s discussion in *Ferri v. Ackerman, supra*, of the immunity of appointed private defense counsel from state tort liability for malpractice. That case is distinguishable from a case such as this which involves the liability of appointed *public* defenders in federal

<sup>1</sup>The Court found that it need not reach this immunity issue in *Polk County v. Dodson*, because it there held that a public defender does not act under color of state law when performing the traditional functions of counsel for a criminal defendant. 454 US at 317, n. 4. The Ninth Circuit Court of Appeals, however, found that it was necessary to reach the immunity question in this case because Glover had somewhat vaguely but sufficiently alleged that public defenders Tower and Babcock conspired with state officials to deprive him of his constitutional rights. *Glover v. Tower, supra*, 700 F2d at 558, n. 1. (App. A, p. 6). Therefore, on the basis of this Court’s decision in *Dennis v. Sparks*, 449 US 24, 29 (1980), the Court of Appeals concluded that Glover’s complaint alleged a conspiracy sufficient to satisfy the color of state law requirement that this Court concluded was not satisfied in *Polk County v. Dodson, supra*. *Glover v. Tower, supra*, 700 F2d at 558, n. 1. (App. A, p. 6).

court under 42 USC § 1983. This Court should resolve the question of public defender immunity under § 1983 now. The Ninth Circuit decision in this case is in conflict with the decision of the Court of Appeals for the Third Circuit on the same issue in *Black v. Bayer*, 672 F2d 309 (1982). Review by this Court is particularly appropriate because, like the Ninth Circuit, the Court of Appeals for the Eighth Circuit has misapplied *Ferri* in cases involving the question of immunity of public defenders under § 1983<sup>2</sup>. Moreover, the absence of explanation or clarification from this Court regarding the scope of its *Ferri* decision has caused the Fourth Circuit to doubt the continued viability of the public defender immunity doctrine established in that circuit's prior cases.<sup>3</sup> Unless this Court allows review in this case, other circuit courts which have established the doctrine of public defender immunity<sup>4</sup> will face a similar quandary, as will judicial and administrative officials with responsibilities for supervising and managing the numerous state and local public defender programs across the country.

<sup>2</sup>*Dodson v. Polk County*, 628 F2d 1104, 1107 (8th Cir. 1980), *reversed on other grounds*, *Polk County v. Dodson*, 454 US 312 (1981).

<sup>3</sup>*See Hall v. Quillen*, 631 F2d 1154, 1155 (4th Cir. 1980), questioning the continued vitality of *Minns v. Paul*, 542 F2d 899 (4th Cir. 1976).

<sup>4</sup>*See Robinson v. Bergstrom*, 579 F2d 401 (7th Cir. 1978). *See also Housand v. Heimen*, 594 F2d 923 (2d Cir. 1979) (*per curiam*).

### Discussion

1. **The issue of public defender immunity under § 1983 is an important federal question.** This Court's holding in *Polk County v. Dodson, supra*, that public defenders do not act under color of state law when providing criminal defense services, does not completely insulate the practice of the nation's public defenders from the deleterious effects of spurious lawsuits filed under § 1983 by unjustifiably disappointed criminal clients. In the present case, the Ninth Circuit reached its conclusion that public defenders were not absolutely immune under 42 U.S.C. § 1983 "with some reluctance" because the court was "mindful of the burden [its] decision may place on already overburdened public defenders' offices. \* \* \*" *Glover v. Tower, supra*, 700 F2d at 559. (App. A, p. 5). The court evidently realized that unscrupulous clients of public defenders would simply avoid the implication of this court's opinion in *Polk County v. Dodson, supra*, by enhancing their purported § 1983 claims with unfounded allegations of conspiracies between their public defenders and various judicial, prosecutorial, and administrative officials. In order to prevent the paralysis of public defender decisionmaking and case processing by a flood of frivolous litigation, this Court should now

address the question of public defender immunity which it left open in *Polk County v. Dodson*.

2. The Ninth Circuit Court of Appeals erroneously applied this Court's decision in *Ferri v. Ackerman* to this case. The attorney involved in *Ferri*, was a *private* attorney appointed to represent an indigent criminal defendant in a federal criminal trial. This Court held that no principle of federal law required the state to accord such an attorney absolute immunity from liability in a state malpractice suit brought against the attorney by his former criminal client. *Ferri v. Ackerman, supra*, 444 US at 201, 205. This case does not involve private counsel. The attorneys whom respondent seeks to sue under § 1983 in this case are *public* defenders. In jurisdictions which have public defender programs, a significantly greater proportion of the responsibility for providing defense services to indigent criminal defendants is assigned to public defenders rather than private attorneys appointed on a case-by-case basis. Large numbers of indigent criminal defendants are assigned to public defenders because, generally, public defender programs can provide defense services at a lower cost to the public than can a private attorney-appointment system. A public defender system can provide defense services at lower cost and with greater efficiency because public defenders generally are specialists who limit their

practice to criminal law and related matters. The benefits of maintaining a public defender system carry a corresponding burden. This burden of representing a large number of exclusively indigent criminal defendants distinguishes public defenders from privately retained attorneys and private attorneys who occasionally are appointed to represent criminal defendants.

Although a public defender is not so much a part of the judicial system that his or her authority to make legal decisions for an indigent criminal defendant depends on state law, a public defender, as the name suggests, serves a public purpose. Efficient performance of the public defender function has a quantifiable, beneficial effect on the criminal justice system. In this particular sense, the defender's role, as contrasted with the role of appointed private counsel discussed in *Ferri*, is sufficiently "judicial" in nature to warrant the protection of absolute immunity afforded to other participants in the criminal justice system. See *Pierson v. Ray*, 386 US 547 (1967) (judges); *Imbler v. Pachtman*, 424 US 409 (1976) (prosecutors); *Briscoe v. Lahue*, \_\_\_ US \_\_\_, 103 SCt 1108 (1983) (witnesses).

The Ninth Circuit's opinion in this case also fails to recognize that unlike *Ferri*, this case involves allegations of liability under *federal* law, to be adjudicated in *federal* court. In *Ferri*, this Court

emphasized that it was concerned only with the extent to which federal law *required* the states to accord immunity in state proceedings. The Court noted:

"The narrow issue presented to this Court is whether federal law in any way pre-empts the freedom of a state to decide the question of immunity in this situation in accord with its own law. We are not concerned with the elements of a state cause of action for malpractice and need not speculate about whether a state court would consider petitioner's allegations to establish a breach of duty or a right to recover damages. Nor are we concerned with the question whether Pennsylvania may conclude as a matter of state law that respondent is absolutely immune. For when state law creates a cause of action, the state is free to define the defenses to that claim, including the defense of immunity, unless of course, the state rule is in conflict with the federal rule." 444 US at 197-198 (footnotes omitted).

*Ferri v. Ackerman* did not deal with the scope of the federal cause of action under 42 U.S.C. § 1983 or the extent to which it is limited in this context by federal immunity principles. *Ferri* addressed only the issue of federal preemption. This case presents the quite different issue of whether § 1983 provides a federal jurisdictional base for disgruntled indigent criminal offenders to sue their public defenders for malpractice. The Ninth Circuit discarded its own established, well-reasoned rejection of such a federal cause of action in reluctant deference to a decision of this Court which is not on point.

The Court should take the opportunity presented by this case to correct past misapplications of *Ferri* and to forestall future misapplications of that case in the context of cases presenting the issue of public defender immunity under § 1983.

3. The approach taken by the Court of Appeals for the Third Circuit in *Black v. Bayer, supra*, is correct. In the wake of this Court's decisions in *Ferri v. Ackerman* and *Polk County v. Dodson*, the Third Circuit Court of Appeals reaffirmed its long-standing rule that public defenders, acting within the scope of their professional duties, are absolutely immune from civil liability under § 1983. *Black v. Bayer, supra*, 672 F2d at 320. The court reached this conclusion after evaluating a number of policy factors. The court concluded that denial of absolute immunity to a public defender under § 1983 would discourage recruitment of new defenders and conceivably would encourage retirement by experienced public defenders. 672 F2d at 318-319, citing *Brown v. Joseph*, 463 F2d 1046, 1049 (3rd Cir. 1972). The court also noted that exposure of public defenders to § 1983 liability would interfere with the speedy and efficient performance of the defender's function. 672 F2d at 319. The Third Circuit has correctly resolved the issue present here.

Public defender programs have been instituted across this country in direct response to this Court's

decisions recognizing the Sixth Amendment right of indigent criminal defendants to court-appointed counsel. In 1961, two years prior to *Gideon v. Wainwright*, 372 US 335 (1963), public defender programs served only 3 percent of the nation's counties and approximately one-fourth of the nation's population. One year after *Agersinger v. Hamlin*, 407 US 25 (1972), public defender programs had been implemented in 28 percent of the nation's counties, to serve two-thirds of the population. Mounts, *Public Defender Programs, Professional Responsibility, and Competent Representation*, 1982 Wis. L. Rev. 473, 481 n. 40; L. Benner & B. Neary, *The Other Face of Justice* 72 (1973). Public defender programs were created as a result of the tremendous increase in demand for proficient criminal defense attorneys and the recognition that some compensation of counsel would be required for adequate representation, that adequate criminal representation was not solely the gratuitous responsibility of the local bar, and that the community responsibility for providing defense services to indigents must be discharged with limited government resources. Mounts, *supra*, 1982 Wis. L. Rev. at 479-481.

Although public defenders owe definite allegiance to their individual clients, it also is evident that public defenders necessarily are subjected to significant and various additional pressures which require

difficult policy choices with respect to the representation of their clients. Faced with large case loads and limited resources, public defenders must make difficult decisions regarding allocation of limited time and resources with the objective of serving each client's needs as fully as possible. Unlike their clients, public defenders must be concerned with the serious difficulties of many criminal defendants and must have a commitment to the overall fairness of the criminal justice system which is as strong as their commitment to each client. It is therefore not surprising that many indigent criminal defendants come away from the adjudicative process with the mistaken belief that their public defenders do not care about them or even are conspiring for their criminal convictions.

In *Imbler v. Pachtman*, *supra*, 424 US at 422-423, this Court recognized that the doctrine of prosecutorial immunity was grounded in part upon "concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust. \* \* \*" The same considerations apply with respect to public defenders.

Public defenders must exercise their independent professional judgment where conflicting interests

are at stake. To permit § 1983 lawsuits to be maintained against public defenders not only would impede the exercise of their independent judgment, it also would detract from their ability to perform their public duty. Defense of § 1983 lawsuits would divert their attention from performance of their criminal defense function. Although it is likely that only a very few *pro se* § 1983 lawsuits ever would be successful, the lawsuits themselves would require the public defender to devote time and energy away from the public function he or she should be performing. Any spurious § 1983 lawsuit which results in a loss of a public defender's time for providing defense services disserves the public interest in providing adequate criminal legal representation to the poor.

As noted by the Third Circuit, this Court, in *Polk County v. Dodson*, recognized the important policy considerations that have prompted lower courts to grant absolute immunity to public defenders.<sup>5</sup> This Court should grant review in this Ninth Circuit case in order to resolve the conflict among the circuits on the question of public defender immunity under §

---

<sup>5</sup>The Third Circuit drew this conclusion from the following statement in *Polk County v. Dodson*, 454 US 312, 324, n. 17:

"\* \* \* Our adversary system functions best when a lawyer enjoys the wholehearted confidence of his client. But confidence will not be improved by creating a disincentive for the states to provide post-conviction assistance to indigent prisoners. To impose § 1983 liability for a lawyer's performance of traditional functions as counsel to a criminal defendant would have precisely that effect."

1983. The Court should resolve the conflict by adopting and refining the rule and rationale of the Third Circuit in *Black v. Bayer*.

### CONCLUSION

The Ninth Circuit Court of Appeals misinterpreted 42 U.S.C. § 1983 and this Court's recent decisions when it resolved the issue presented in this case. The significance of the issue of public defender immunity under § 1983 transcends this particular case. For all of the reasons discussed above, this petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit should be granted.

Respectfully submitted,

DAVE FROHNMAYER

Attorney General of Oregon

WILLIAM F. GARY

Solicitor General

JAMES E. MOUNTAIN, JR.

Deputy Solicitor General

Counsel for Petitioners

## Appendix A

For Publication

FILED

MAR 1 1983

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

PHILLIP B. WINBERRY  
CLERK, U.S. COURT OF APPEALS

BILLY IRL GLOVER,

Plaintiff-Appellant, )

vs. )

CA No. 81-3199

DC No. CV 80-6720

BRUCE TOWER, Public Defender of Douglas  
County, Oregon and GARY BABCOCK, Public  
Defender of the State of Oregon, )

OPINION

Defendants-Appellees. )

Appeal from the United States District Court  
for the District of Oregon  
Honorable Robert C. Belloni, District Judge, Presiding  
Argued and Submitted December 7, 1982

Before: GOODWIN, PREGERSON and CANBY, Circuit Judges

CANBY, Circuit Judge:

Glover appeals the district court's dismissal of his civil rights action. The complaint, which was filed by Glover pro se, alleged that the public defenders who represented him in a prior state criminal action violated the provisions of 42 U.S.C. §§ 1981, 1982, 1983 and 1985(3) by conspiring with various public officials to violate his constitutional rights. The district court held that Glover had failed to state a claim upon which relief could be granted and dismissed his action.

Glover alleged that his public defenders at trial and on appeal violated his constitutional rights by conspiring with the trial judge, the Oregon Court of Appeals and other named and

1 unnamed state officials to secure his conviction on a felony charge  
2 brought by the State of Oregon. He alleged that defendant Tower  
3 intentionally failed to obtain evidence to support his defense of  
4 mental defect and refused to withdraw as counsel to allow Glover to  
5 represent himself. He further alleged the existence of a  
6 conspiracy between Tower and the trial judge to secure his  
7 conviction. In furtherance of that conspiracy, the trial judge  
8 allegedly denied Glover's motions for new counsel and for a new  
9 trial. The Oregon Court of Appeals is alleged to have participated  
10 in the conspiracy by accepting defendant Babcock's appellate brief  
11 over Glover's objections and by refusing to allow Glover to  
12 represent himself during the appeal.

13 Glover also alleged that Babcock, as public defender  
14 administrator, appointed himself to represent Glover on appeal to  
15 insure that his conviction would be upheld. Similarly, he alleged  
16 that Judge Lee Johnson had himself placed on the panel which was to  
17 hear Glover's appeal to insure that his conviction would be  
18 affirmed. Judge Johnson had been attorney general at the time of  
19 Glover's trial and was named to the Oregon Court of Appeals during  
20 the interim.

21 The district court held that Glover had failed to allege  
22 anything in the nature of racial discrimination, necessary for  
23 section 1981 and 1982 claims, or the type of class-based  
24 discrimination necessary for a section 1985(3) claim. No extended  
25 discussion of these holdings is required. The district court was  
26 correct and that portion of its judgment is affirmed. See London

1 v. Coopers & Lybrand, 644 F.2d 811, 818 n.4 (9th Cir. 1981);  
2 Griffin v. Breckenridge, 403 U.S. 88 (1971). Glover's contention  
3 on appeal that he was treated less favorably as an indigent than he  
4 would have been had he been affluent enough to retain his own  
5 lawyer does not, in our view, make out a proper class-based 1983(3)  
6 claim.

7 The district court also held that Glover's remaining claim  
8 under section 1983 failed to state a cause of action because public  
9 defenders are absolutely immune from suit under section 1983. That  
10 portion of the court's ruling was error and we reverse.

11 In Miller v. Barilla, 549 F.2d 648 (9th Cir. 1977), this  
12 court adopted the rationale of Minns v. Paul, 542 F.2d 899 (4th  
13 Cir.), cert. denied, 429 U.S. 1102 (1976), and announced a rule of  
14 absolute immunity for public defenders under section 1983. We  
15 reasoned that absolute immunity would encourage able lawyers to  
16 represent indigents and encourage counsel in "the full exercise of  
17 professionalism . . . ." Miller v. Barilla, 549 F.2d at 649  
18 (quoting Minns v. Paul, 542 F.2d at 901). We concluded that there  
19 was no valid reason to treat public defenders differently from  
20 prosecutors and judges in this regard.

21 The district court understandably felt itself bound by  
22 Miller.<sup>1/</sup> Our review of a subsequent Supreme Court case, Ferri  
23 v. Ackerman, 444 U.S. 193 (1979), has convinced us that Miller is  
24 no longer good law. In Ferri, the Court held that an attorney  
25 appointed to represent an indigent criminal defendant in a federal  
26 prosecution was not entitled, as a matter of federal law, to

1 absolute immunity in a subsequent state malpractice action. The  
2 Court explained that appointed counsel are subject to the same  
3 duties and obligations as retained counsel. The Court  
4 distinguished the public defender from a judge or prosecutor,  
5 noting that the latter serve broad societal interests and are  
6 subject to conflicting claims. Immunity is necessary to forestall  
7 an atmosphere of intimidation, and to insure that they have maximum  
8 ability to deal fearlessly with the public. In contrast, the  
9 public defender is obligated to serve the undivided interest of his  
10 client. See Sellars v. Proconier, 641 F.2d 1295, 1299 n.7 (9th  
11 Cir.), cert. denied, 102 S.Ct. 678 (1981); see also Polk County v.  
12 Dodson, \_\_\_ U.S. \_\_\_, 102 S.Ct. 445 (1981)(public defender is the  
13 functional equivalent of a privately retained attorney).

14 Ferri did not actually overrule Miller because the issue  
15 presented was limited to federal preemption of state law governing  
16 immunity in malpractice actions. See Black v. Bayer, 672 F.2d 309  
17 (3d Cir. 1982)(reaffirming rule of absolute immunity for public  
18 defenders). Nonetheless, the Ferri Court's refusal to extend the  
19 immunity accorded judges and prosecutors to appointed counsel  
20 undercuts the basis for Miller. See Hall v. Quillen, 631 F.2d 1154  
21 (4th Cir. 1980)(Ferri casts considerable doubt on the continuing  
22 validity of Minns), cert. denied, 102 S.Ct. 999 (1982); White v.  
23 Bloom, 621 F.2d 276, 280 (8th Cir. 1980)(public defenders subject  
24 to suit under section 1983), cert. denied, 449 U.S. 995 (1980), 449  
25 U.S. 1089 (1981).

1           We conclude that Miller cannot survive the rationale of  
2 Ferri, and that Ferri and Polk County v. Dodson, supra, are  
3 inconsistent in principle with any immunity, qualified or absolute,  
4 of public defenders charged with conspiring with state officials in  
5 violation of 42 U.S.C. § 1983. We reach this conclusion with some  
6 reluctance, because we are mindful of the burden our decision may  
7 place on already-overburdened public defenders' offices.  
8 Nevertheless, we can construe Ferri and Polk County no other way.

9           AFFIRMED in part, REVERSED in part and REMANDED.  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

## Footnotes

1  
2 1. The district court did not address the preliminary issue of  
3 whether Glover alleged that defendants acted under color of state  
4 law. "[A] public defender does not act under color of state law  
5 when performing a lawyer's traditional functions as counsel to a  
6 defendant in a criminal proceeding." Polk County v. Dodson, \_\_\_  
7 U.S. \_\_\_, 102 S.Ct. 445, 453 (1981). Thus a suit alleging  
8 constitutional violations on the part of a public defender acting  
9 alone would not state a claim under section 1983. In this case,  
10 however, Glover alleged that the public defenders conspired with  
11 state officials. Private parties who conspire with a state  
12 official acting in his official capacity do act under color of  
13 state law. Dennis v. Sparks, 449 U.S. 24, 29 (1980). In Sparks,  
14 the Court held that a complaint which alleged a conspiracy between  
15 a state judge and two private defendants to cause an injunction to  
16 be corruptly issued, satisfied the color of state law requirement.  
17 Glover's allegations of conspiracy were somewhat vague. On remand  
18 the district court may require more specificity, but at this stage  
19 we are satisfied that Glover's allegations of color of state law  
20 are not fatally deficient on their face.  
21  
22  
23  
24  
25  
26

## Appendix B

CAL & A/C  
 14-301  
 FILED  
 APR 11 1981  
 [Signature]

IN THE UNITED STATES DISTRICT COURT  
 FOR THE DISTRICT OF OREGON

BILLY IRL GLOVER,

Plaintiff,

Civil No. 80-6720-E

v.

ORDER

BRUCE TOWER, and  
 GARY BABCOCK;

Defendants.

Billy Irl Glover, plaintiff, brings this civil rights action pursuant to 42 U.S.C. 1981, 1982, 1983 and 1985(3), alleging that his public defenders at trial and on appeal inadequately represented him, and conspired with the trial judge and other unnamed officials to secure his conviction of a felony. Plaintiff is presently incarcerated in the Oregon State Penitentiary.

Defendants deny that plaintiff has stated a claim for relief, and move for dismissal.

Plaintiff has not stated a claim under 42 U.S.C. § 1981 or 1982 because he has not alleged a racially-motivated deprivation of rights or property. Des Vergnes v. Seekonk Water District, 601 F.2d 9 (1st Cir. 1979); Jones v. Mayer, 392 U.S. 409 (1968).

Plaintiff has not stated a claim under 42 U.S.C. § 1985(3) because he has not alleged that the conspiracy was founded upon "some racial, or perhaps otherwise class-based, invidiously discriminatory animus." Griffin v. Breckenridge,

1 403 U.S. 88, 102 (1971).

2 Finally, plaintiff has not stated a claim under 42  
3 U.S.C. § 1983 because public defenders are absolutely immune  
4 from liability for acts done in the performance of their  
5 judicial function. Miller v. Barilla, 549 F.2d 648 (9th  
6 Cir. 1977); Housand v. Heiman, 594 F.2d 923 (2nd Cir. 1979).

7 Plaintiff contends that defendants were acting outside  
8 the scope of their immunity when they conspired to secure  
9 his conviction. As evidence of this conspiracy, he claims  
10 that defendants failed to obtain certain evidence and witnesses  
11 to support his defense of mental defect or disease, and  
12 refused to withdraw as counsel, in order to allow plaintiff  
13 to represent himself. Plaintiff further alleges that the  
14 trial judge aided in the conspiracy by refusing to grant his  
15 motions for appointment of new counsel and for a new trial.  
16 The appellate court allegedly participated in the conspiracy  
17 by accepting defendant Babcock's brief, and by refusing to  
18 allow plaintiff to represent himself.

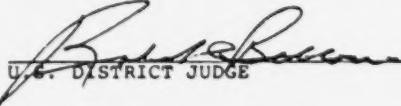
19 Plaintiff's claim fails to allege any actions by  
20 defendants which lie outside the scope of their judicial  
21 function. For purposes of 42 U.S.C. § 1983, public defenders  
22 have "unfettered discretion" in their decisions regarding  
23 the introduction of evidence, the presentation of witnesses,  
24 and the submission of motions.<sup>1</sup> Therefore, plaintiff's  
25 allegations do not strip defendants of their absolute  
26 immunity.

---

27  
28 1/ Miller v. Barilla, 549 F.2d at 649; Housand v.  
29 Heiman, 594 F.2d at 924-925.

1 Defendants' motion to dismiss is granted and this pro-  
2 ceeding is dismissed. The Clerk is directed to enter  
3 judgment accordingly.

4 DATED this <sup>April</sup> 1st day of March, 1981.

5  
6   
7 U.S. DISTRICT JUDGE  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32

## Appendix C

THE ORIGINAL COPY

Billy Irl Glover  
 No. 42831  
 405 State Street  
 Salem, Oregon 97310  
 AT PRO PER

FORM TO BE USED BY A PRISONER IN FILING A COMPLAINT  
 UNDER THE CIVIL RIGHTS ACT, 42 U.S.C. §1983

In the United States District Court  
 For the District of Oregon

BILLY IRL GLOVER, Plaintiff

[Enter above the full name of  
 the plaintiff in this action.]

U.S. DISTRICT COURT  
 DISTRICT OF OREGON  
 SOUTHERN DIVISION  
 FILED

v.

COMPLAINT

DEC 12 1980

BRUCE TOWER, Douglas County Public Defender

GARY BABCOCK, Oregon State Public Defender

Defendants

Civil No.

ROBERT M. CHRIST, CLERK  
DEPUTY

80-6720-E GNS

[Enter above the full name of the  
 defendant or defendants in this

action.] ACTION UNDER TITLE 42 U.S.C. 1983, 1981, 1982 & 1985 (3) & related statutes  
 governing CONSPIRACY BY STATE OFFICIALS ACTING UNDER COLOR OF STATE AUTHORITY  
 TO DEPRIVE PLAINTIFF OF HIS CIVIL RIGHTS AS OUTLINED HEREIN.

# I. Previous Lawsuits

- A. Have you begun other lawsuits in state or federal court dealing with the same facts involved in this action or otherwise relating to your imprisonment? Yes [ ] No [x]

- BUT THERE IS A RELATED CASE PRESENTLY BEING LITIGATED (Your File # 80-6371-E)  
 B. If your answer to A is yes, describe the lawsuit in the space below. [If there is more than one lawsuit, describe the additional lawsuits on another piece of paper, using the same outline:]

## 1. Parties to this previous lawsuit

Plaintiffs N/A

Defendants N/A

2. Court [if federal court, name the district; if state court, name the county]

N/A

3. Docket number N/A

4. Name of judge to whom case was assigned N/A

5. Disposition [for example: Was the case dismissed? Was it appealed? Is it still pending?]

N/A

6. Approximate date of filing lawsuit N/A

7. Approximate date of disposition N/A

II. Place of Present Confinement OREGON STATE PENITENTIARY

A. Is there a prisoner grievance procedure in this institution?  
Yes ☒ No ☐

B. Did you present the facts relating to your complaint in the state prisoner grievance procedure? Yes ☐ No ☒

C. If your answer is YES,

1. What steps did you take? N/A

2. What was the result? N/A

D. If your answer is NO, explain why not This is NOT a prisoner grievance type suit but a suit against other officials acting under state authority.

E. If there is no prison grievance procedure in the institution, did you complain to prison authorities? ~~xxxxxx~~ N/A

F. If your answer is YES,

1. What steps did you take? N/A

2. What was the result? N/A

II. Parties

[In item A below, place your name in the first blank and place your present address in the second blank. Do the same for additional plaintiffs, if any.]

A. Name of Plaintiff BILLY IRL GLOVER

Address BOX 42831, 2605 State Street, Selem, Oregon 97310

[In item B below, place the full name of the defendant in the first blank, his official position in the second blank, and his place of employment in the third blank. Use item C for the names, positions, and places of employment of any additional defendants.]

- B. Defendant BRUCE TOWER is employed as COUNTY PUBLIC DEFENDER at DOUGLAS COUNTY CIRCUIT COURT, 1 COURTHOUSE, ROSEBERG, OREGON
- C. Additional Defendants GARY BABCOCK who is employed as the Oregon State Public Defender, 1655 State Street, Salem, Oregon 97310

#### IV. Statement of Claim

[State here as briefly as possible the facts of your case. Describe how each defendant is involved. Include also the names of other persons involved, dates, and places. Do not give any legal arguments or cite any cases or statutes. If you intend to allege a number of related claims, number and set forth each claim in a separate paragraph. Use as much space as you need. Attach extra sheet if necessary.]

Bruce Tower, acting as a representative of the State of Oregon in the capacity of the Douglas County Public Defender conspired with other state officials - - including the trial court judges of Charles Woodrich and Robert Stults, who are unnamed defendants in this action since judges are immune from damages even though done with malice and forethought - - to deprive your plaintiff of his liberty by refusing to discharge his responsibilities and obligations as court appointed counsel for your plaintiff in the Douglas County Circuit Court case No. 76-0386.  
(SEE ADDITIONAL INFORMATION IN THE ATTACHED SUPPLEMENT TITLED "IV Statement of Claim.")

#### V. Relief

[State briefly exactly what you want the court to do for you.

Make no legal arguments. Cite no cases or statutes.]

From defendant Bruce Tower plaintiff asks the court to award punitive damages in the amount of \$5 million.

From defendant Gary Babcock plaintiff asks the court to award punitive damages in the amount of \$5 million.

Signed this 30th day of October, 1990.

Billy Delaney  
[Signature of Plaintiff]

I declare under penalty of perjury that the foregoing is true and correct.

10/30/90  
[Date]

Billy Delaney  
[Signature of Plaintiff]

*Certified A True Copy*

IV). Statement of Clair (Contd. from page 3)

This is more than a mal-practice situation by defendant Bruce Tower as he conspired with and acted in unison with other state officials to prevent your plaintiff from mustering, preserving and presenting his defense in a criminal case in Douglas County (Circuit Court No. 76-0386).

In the criminal case referred to the defense proffered was THE AFFIRMATIVE DEFENSE OF MENTAL DEFECT OR DISEASE WHICH DIMINISHED OR NEGATED CRIMINAL RESPONSIBILITY.

There was ample evidence of the validity of this defense available to defendant Bruce Tower. During the entire six months defendant Tower had to prepare for the trial in the Circuit Court for Douglas County your plaintiff insisted on and pleaded with defendant Tower to search out and investigate the defense and to secure evidence that was needed; contact witnesses pertinent to the case; secure past psychiatric reports; and to otherwise research and prepare the defense.

However, state agents persuaded defendant Tower to do nothing to prepare for the defense so that there would be a guaranteed conviction of your plaintiff. These same state agents persuaded the trial court judges of Charles Woodrich and Robert Stults to ignore your plaintiff's every request for redress in the Douglas County Circuit Court so that these serious Constitutional errors could be corrected and your plaintiff could defend himself against those charges.

The reason these other state agents got involved in this criminal case was because your plaintiff needed certain documents from those state agents and their agencies (COMPARE FILE # 80 - 6371-E for the background setting for this case).

For the background information as to the manner in which defendant Tower carried out this conspiracy to deprive your plaintiff of his basic rights to defend himself, the Court is referred to exhibit # 1 attached which gives a rather thorough account of how this conspiracy was carried out.

Once the attached exhibit # 1 is studied it becomes evident that defendant Tower NEVER INTENDED TO ALLOW YOUR PLAINTIFF TO DEFEND HIMSELF AND THE RECORD WILL SHOW ALSO THAT HE REFUSED TO TAKE HIMSELF OFF THE CASE TOO ONCE IT WAS CLEARLY POINTED OUT THAT HE WAS TOTALLY DERELICT IN HIS RESPONSIBILITIES.

As for the involvement of the second defendant, Mr. Gary Babcock, Oregon State Public Defender, he too was enlisted by those other state agents to make certain your plaintiff DID NOT GET THE CHANCE TO CONTEST THE ILLEGAL CONVICTION FORCED ON HIM BY THE TRIAL COURT.

Defendant Babcock was fully informed of the issues asserted by your Plaintiff in pro per at the trial court lever and additionally informed as to where these issues could be found in the trial court record. But, he refused to obtain the pertinent portions of the trial court record and prepared an opening brief which was incomplete, inadequate and in error. When your petitioner rejected this opening brief and asked defendant Babcock to update it and make it adequate and correct, Mr. Babcock refused. This was a deliberate and knowing and informed decision to deprive your plaintiff of a fair and adequate appeal so that your plaintiff would be deprived of his liberty for a long extended time without due process of law and so that your plaintiff would once again be thrust under the authority of and at the direct mercy of former prison officials who had caused your plaintiff's emotional and psychotic break leading to the criminal charges in Douglas County.

Since your Plaintiff was an indigent all these state officials felt free to enlist these two defendands (Tower and Babcock) to conspire with them to deprive your petitioner of his basic rights and his liberty so that those state officials who had previously proved themselves dishonest could once again have total power and control over your plaintiff. These state officials knew that if your plaintiff were allowed to defend himself their former dishonest actions would become public know-

ledge and could cause repercussions.

This conspiracy went so far that when the case was finally heard by the Court of Appeals (BASED SOLELY ON THE TOTALLY INADEQUATE, INCOMPLETE AND ERRONEOUS OPENING BRIEF FILED BY THE DEFENDANT BABCOCK) Mr. Lee Johnson, former Attorney General for Oregon who masterminded the conspiracy set forth in your file # 80-6371-E placed himself on the court that "reviewed" plaintiff's appeal.

It should be pointed out that there is no way either defendant Tower or defendant Babcock can appear in court and defend their actions in this criminal case from Douglas County (File # 76-0386). Once the trial record is read and the communications to and from defendant Babcock concerning the appeal are reviewed then the conspiracy becomes evident. They both KNOWINGLY and deliberately deprived your plaintiff of his basic civil rights to defend himself against serious criminal charges knowing that no state court would call them to task.

Therefore, your plaintiff's only redress is through civil action via a Title 42 U.S.C. 1983. Your plaintiff has already demonstrated that the state courts will not give him redress.

Again your plaintiff refers this Honorable Court to the sister case of 80-6371-E together with the attached Exhibit # 1 for proof of this conspiracy by state officials who used these two named defendant state officials (Bruce Tower and Gary Babcock) to execute their conspiracy against this plaintiff.

*Billy Earl Glover*  
 \_\_\_\_\_  
 Billy Earl Glover, Plaintiff  
 (Under Penalty of Perjury)

*Certified A True Copy*  
*THE ORIGINAL*  
*BG*

